



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
901 NORTH 5TH STREET  
KANSAS CITY, KANSAS 66101

29 APR 2004

Mike Linder, Director  
Nebraska Department of Environmental Quality  
PO Box 98922  
Lincoln, NE 68509-8922

Dear Mr. Linder:

Re: Environmental Protection Agency Review of the Nebraska Section 303(d) List of Impaired Waters Contained in the Nebraska 2004 Surface Water Quality Integrated Report

The U.S. Environmental Protection Agency (EPA) has completed its review of the Nebraska Section 303(d) List of Impaired Waters, submitted as Category 5 in the Nebraska 2004 Surface Water Quality Integrated Report by the Nebraska Department of Environmental Quality (NDEQ) on April 1, 2004, as required under Section 303(d) of the Clean Water Act (CWA). The impaired waters list identifies those Water Quality Limited Segments (WQLSs) of the state which are impaired and for which Total Maximum Daily Loads (TMDLs) shall be developed. The statutory and regulatory requirements, and EPA's review of Nebraska's compliance with each requirement, are described in further detail below.

For the 2004 reporting year, EPA recommended that states provide a single water quality monitoring and assessment report, known as the Integrated Report, that combines the comprehensive Section 305(b) report on water quality and the Section 303(d) list of waters for which TMDLs are required. The recommended format includes categories which represent varying levels of Water Quality Standards (WQS) attainment, ranging from Category 1, where all of a water's designated uses are met, to Category 5, where a pollutant impairs a water and a TMDL is required. Nebraska has chosen to follow EPA's recommendation and submitted the Integrated Report for the 2004 reporting cycle.

**Section 303(d) Statutory and Regulatory Background:**

Section 303(d)(1) of the CWA directs states to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such



waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that states do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the CWA, (2) more stringent effluent limitations required by state or local authority, and (3) other pollution control requirements required by state, local, or federal authority. *See* 40 CFR 130.7(b)(1).

**Consideration of Existing and Readily Available Water Quality-Related Data and Information:**

In developing Section 303(d) lists, states are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the state's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. *See* 40 CFR 130.7(b)(5). In addition to these minimum categories, states are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. *See* Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance"). While states are required to evaluate all existing and readily available water quality-related data and information, states may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring states to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require states to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information regarding decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the region.

### **Priority Ranking:**

EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the CWA that states establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require states to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, states must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. *See* Section 303(d)(1)(A). As long as these factors are taken into account, the CWA provides that states establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. *See* 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.

### **Analysis:**

#### **1. Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information:**

NDEQ considered all data and information as required by 40 CFR 130.7(b)(5). The state appropriately considered data and information from the state's ambient water monitoring network, computer modeling, the United States Geological Survey, University of Nebraska at Lincoln, CWA Section 305(b) report, fish kill report data, and waters identified as impaired by the CWA Section 319 nonpoint assessment.

In further identifying WQLS's, NDEQ provided for public participation by: requesting comments on the October 2003 *Methodologies for Waterbody Assessment and Development of the 2004 Integrated Report for Nebraska* used in determining Section 303(d) impaired waterbodies; requesting data from data collection agencies and stakeholders; holding public meetings; and by providing a 30 day public comment period on the draft Integrated Report. NDEQ also responded to comments received on the 303(d) list methodology and the draft Integrated Report, and submitted those responses to EPA for review as part of the Integrated Report submission.

The state properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. In *Pronsolino v. Nastri*, the District Court for the Northern District of California held that section 303(d) of the CWA authorizes EPA to

identify and establish TMDLs for waters impaired by nonpoint sources. *Pronsolino v. Nastri*, 291 F.3d 1123 (9<sup>th</sup> Cir. 2002). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997.

**Conclusions:**

EPA has reviewed Nebraska's description of the data and information it considered, its methodology for identifying waters, and monitoring data used in determining impairment. EPA concludes that the state properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5) and reasonably identified waters required to be listed.

**2. Priority Ranking and Targeting:**

EPA reviewed the state's priority ranking of listed waters for TMDL development, and concludes that the state properly took into account the severity of pollution and the uses to be made of such waters. In their prioritization process, the state properly considered relevant factors such as: the presence of sensitive aquatic resources; economic or aesthetic importance; and degree of public interest. The state has proposed the following 14 segments for TMDL development over the next two years:

*Big Blue River Basin:* BB1-10000, BB1-20000 and BB3-10000 (E. coli), BB2-L0020 (Atrazine and pH)

*Little Blue River Basin:* LB1-10000 and LB1-20000 (E. coli)

*Middle Platte River Basin:* MP2-L0520 (Fecal coliform and Nutrients)

*Missouri Tributaries Basin:* MT-L0120 (Sediment)

*Nemaha River Basin:* NE2-L0090 (Nutrients and Sediment)

*Republican River Basin:* RE1-10000, RE1-20000, RE1-50000, RE3-10000 and RE3-20300 (E. coli)

**Conclusions:**

EPA has reviewed the state's submission, and has concluded that the state has adequately prioritized waters still requiring TMDLs as required by 40 CFR 130.7(b)(4). EPA's review is based on its analysis of information supplied by the State as described in the *Methodology for Waterbody Assessment and Developing the 2002 Section 303(d) List of Impaired Waterbodies for Nebraska*.

### 3. Nebraska's 2004 Integrated Report:

The State's Integrated Report submission follows the format of the EPA *Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act* (EPA, 2003). The guidance utilizes five assessment categories to provide a comprehensive description of the water quality status and beneficial use attainment of all waters within a state. This report format is intended to satisfy the reporting requirements of Sections 305(b) and 314, and for the purposes of this decision letter, the listing requirements of Section 303(d) of the CWA. The five categories are:

- Category 1: All designated uses are met;
- Category 2: Some of the designated uses are met, but there is insufficient data to determine if remaining designated uses are met;
- Category 3: Insufficient data to determine whether any designated uses are met;
- Category 4: Water is impaired or threatened, but a TMDL is not needed (includes sub-categories);
- Category 5: Water is impaired or threatened and a TMDL is needed.

By analyzing all existing and readily available water quality-related data and information, NDEQ has identified 147 waterbodies in Category 5 of the Nebraska 2004 Integrated Report which require a total of 223 TMDLs. These waterbodies comprise the proposed CWA Section 303(d) list in Nebraska for the 2004 reporting cycle and are identified in Enclosure 1.

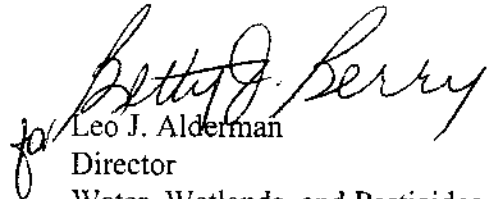
Additionally, federal regulations at 40 CFR 130.7(b)(6)(iv) allow states to demonstrate good cause for not including specific waterbodies on their 303(d) list. The state has demonstrated to EPA's satisfaction good cause for not including on the 2004 list a number of waterbodies which were on the EPA approved 2002 list. These waterbodies were removed from the 2002 list for several reasons including: TMDLs which have since been established for those waterbodies; NPDES permits which have been issued; demonstration that no pollutant is causing impairment; and/or that water quality standards are now being met. All 2002 listed waterbodies which have been removed from the 2004 list are identified in Enclosure 2.

#### **Finding:**

Based on our review of the Nebraska 2004 Surface Water Quality Integrated Report, and supporting documentation and information, we have determined that Nebraska's List of WQLSs still requiring TMDLs contained in Category 5 meets the requirements of Section 303(d) of the CWA and EPA's implementing regulations. Therefore, by this letter, EPA hereby approves Nebraska's 2004 CWA Section 303(d) List of Impaired Waters.

We would like to thank NDEQ for the exceptional work the agency and its staff have done in preparation of the 2004 Integrated Report, its efforts to seek public participation, and the continued improvement in interagency coordination. If you have any questions regarding this letter, please contact me at (913)551-7001.

Sincerely,

  
for Leo J. Alderman  
Director  
Water, Wetlands, and Pesticides Division

Enclosure(s)

cc: Pat O'Brien  
Nebraska Department of Environmental Quality

Steve Anschutz  
U.S. Fish and Wildlife Service